

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In the Matter of)	ORDER
)	
CSI CAPACITORS, A DIVISION OF)	Docket No. 84-22
CSI TECHNOLOGIES, INC., ATI)	
INDUSTRIES, AND HAROLD)	
DELLETT)	
)	
Respondents.)	
)	
Proceeding Under Section)	
106 of the Comprehensive)	
Environmental Response,)	
Compensation and Liability Act)	
of 1980 (42 U.S.C. §9606))	

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JURISDICTION

The following Order is issued on this date to CSI Capacitors, a division of CSI Technologies, Inc. (CSI), ATI Industries (ATI), and Harold Dellett (Dellett), Respondents, pursuant to the authority vested in the President of the United States by §106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601 et seq., delegated to the Administrator of the United State Environmental Protection Agency (EPA) by Executive Order Number 12316

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1 (August 20, 1981, 46 FR 42237), and redelegated to the Regional
2 Administrator, EPA, Region 9 (delegation 14-14B, April 16, 1984)
3 and to the Director, Toxics and Waste Management Division, Re-
4 gion 9 (delegation R1290-24, August 14, 1984). Notice of the
5 issuance of this Order has been given to the State of California.
6

7 FINDINGS OF FACT

8 1. Incorporated by reference are the Findings of Fact con-
9 tained in EPA Orders No. 84-19, 84-20 and 84-21, issued to Re-
10 spondents on August 30, 1984 (Attachment 1).

11 2. Respondent CSI Capacitors (CSI) is the former sub-
12 lessee and operator of a facility located at 220 N. Tulip Street,
13 Escondido, California. This facility encompasses approximately
14 210,000 square feet of a building (20,000 of which was sub-
15 leased by CSI) and an uncalculated amount of area outside of
16 the building. The facility was used by CSI from 1971 to April,
17 1984.

18 3. Respondent ATI Industries (ATI) is the lessee of
19 the property described in paragraph 2 above.

20 4. Respondent Harold Dellett is the owner of the property
21 described in paragraph 2 above.

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1 5. On September 4, 1984, Tom Severino of EPA met with
2 CSI and its technical consultant to clarify the specific re-
3 quirements of the August 30, 1984 Orders.

4 6. On September 6, 1984, Tom Severino, James Jaffe and Eric
5 Koglin of EPA met with Respondents to discuss the requirements
6 of the August 30, 1984 orders. At this meeting, an extension of
7 time to comply with paragraph 2 of the Orders was verbally
8 granted to all Respondents.

9 7. On September 11, 1984, the August 30, 1984 Orders were
10 modified to formalize the September 6, 1984 extension (Attach-
11 ment 2).

12 8. On September 12, 1984 an Action Memo/CERCLA Funding Re-
13 quest in the amount of (\$77,000) was approved by the Director,
14 Toxics & Waste Management Division, EPA Region 9, to provide
15 for site security and characterization.

16 9. On September 13, 1984, EPA determined that Respondents
17 had not complied with the August 30, 1984 Orders. EPA then deter-
18 mined that it would complete the site assessment under the author-
19 ity of Section 104(a) of the Comprehensive, Environmental
20 Response, Compensation and Liability Act, 42 U.S.C. §9601
21 et. seq. (CERCLA). Respondents were notified of this
22 determination in writing on September 13, 1984.

23 10. On October 3, 1984, EPA completed the initial phase of
24 the site assessment.

25 11. On November 21, 1984, EPA transmitted to Respondents
26 the results of the site assessment and notified them of the need
27 to undertake a removal action at the facility (Attachment 3).

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1 12. On November 30, 1984 and December 12, 1984, EPA trans-
2 mitted additional information concerning the site assessment
3 to the Respondents.

4 13. On November 30, 1984, EPA was advised by the San Diego
5 County Health Department that the facility was inundated with
6 water resulting from a recent storm, that a significant quantity
7 of rain water had entered the former CSI area causing the pit to
8 fill with water, and that the Boeing storage area below was
9 affected. On this same date, Tom Severino (EPA) contacted
10 Clarence Smith (ATI) to advise him of the problem and inform him
11 of his responsibility to mitigate the problem and to eliminate any
12 future water movement into the facility by whatever means neces-
13 sary. ATI agreed to investigate, and in fact, unclogged the roof
14 drains, providing a temporary solution to the problem.

15 14. On December 10, 1984, EPA representatives met with
16 Respondents to clarify the results of the site assessment and to
17 advise them to proceed immediately to develop a clean up plan.
18 Respondents were also advised that an Order would be issued
19 requiring them to develop and implement the site cleanup plan.

20 15. For purposes of this Order, polychlorinated biphenol
21 (PCB) contamination is defined as any PCB concentration greater
22 than 50 parts per million (ppm) and/ or 80 micrograms per one
23 hundred square centimeters (80ug/100cm²).

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CONCLUSIONS OF LAW

1. The building and property at 220 N. Tulip Street in Escondido, California, is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. 9601(9).

2. Respondents are "persons" as defined in Section 101(21) of CERCLA, 42 U.S.C. 9601(21).

3. The PCBs at the site are "hazardous substances" as defined in Section 101(14) of CERCLA, 42 U.S.C. 9601(14).

4. The past, present, and potential migration of hazardous substances from the facilities into the air and water constitute actual and threatened "releases" as defined in Section 101(22) of CERCLA, 42 U.S.C. 9601(22).

5. Respondent Harold Dellett is a responsible party pursuant to §107(a)(1) and (2) of CERCLA, because he is the present owner of the facility.

6. Respondents CSI and ATI are responsible parties pursuant to §107(a)(1) and (2) of CERCLA because they were and are "operators" of the facility.

7. The Respondents are jointly and severally liable for undertaking the response action required by this Order unless specifically indicated otherwise.

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DETERMINATIONS

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, EPA has determined that:

1. The actual and threatened release of hazardous substances at and from the facility may present an imminent and substantial endangerment to the public health, welfare, and the environment.

2. The response actions required by this Order are necessary to protect public health and welfare and the environment.

3. The initiation of an immediate removal action will prevent or mitigate immediate and significant risk of harm to human life and health and to the environment.

1 ORDER

2 Based upon the foregoing FINDINGS OF FACT, CONCLUSIONS
3 OF LAW, and DETERMINATIONS, Respondent is hereby ordered
4 and directed, pursuant to §106 of CERCLA, 42 U.S.C. §9606(a)
5 to:

6 I. Restriction of Access

7 Continue to restrict access to the facility in the same
8 manner as required in the August 30, 1984 Orders, except for
9 restriction of the western parking lot (¶1(C) in the Order).

10 II. Elimination of Rainwater Infiltration/Runoff

11 Immediately take any and all actions necessary to
12 eliminate any further rainwater infiltration into or conveyance
13 of runoff from the contaminated areas of the facility.

14 III. Cleanup Proposal

15 Submit to EPA within 30 calendar days of the effective
16 date of this Order a written Proposal for site cleanup including
17 but not limited to the following:

18 A. Removal, including proper transportation and disposal
19 of all PCB contaminated liquids and solids from the
20 facility (which includes the building and surrounding
21 property). The Proposal must describe in detail
22 the method(s) proposed to accomplish the removal,
23 transportation and disposal of all PCB contaminated
24 material. At a minimum, the areas which require
25 cleanup include:

- 26 1. Portions of the floor of the former CSI area
27 including the sub floor, floor joists and insu-
28 lation.

2. The "pit" including drums, capacitors, concrete, soil etc.

3. The ceiling and walls of the former CSI area.

4. The area outside of the facility in and around the loading dock and along the south wall.

B. A plan to conduct additional sampling during and after the cleanup to accurately delineate the extent of the contamination and to confirm that the cleanup is complete and that no contamination remains at the site. This plan must address potential sample locations, sample collection protocols and methodologies, and a Quality Assurance/Quality Control Plan (QA/QC) including collection of split samples for EPA and State or local authorities.

C. A Site Safety Plan consistent with EPA and OSHA requirements.

EPA will review this Proposal and notify Respondents whether or not it has been approved. In the event of disapproval, EPA shall inform Respondents of the deficiencies and Respondents shall make modifications, acquire additional information, and otherwise act to correct the deficiencies. Failure to submit an approvable Proposal shall constitute a violation of this Order.

IV. EPA Oversight Authority

EPA will oversee all on-site activities. Respondent shall provide EPA 48 hours notice before initiating any site activity. Tom Severino is designated as the EPA On-Scene Coordinator (OSC) who shall have the authority vested by 40 C.F.R. §300 et. seq., published in 47 Fed.Reg. 31180 (July

1 16, 1982).

2 If the OSC determines that any Respondent is not complying
3 with the terms of this Order, or that any Respondent is not
4 proceeding with work in a timely manner, or that any Respondent's
5 activities pose an imminent and substantial endangerment to
6 the public health or welfare or the environment, the OSC may re-
7 quire Respondent(s) to halt activities and initiate a Federal
8 clean up of the facility. Respondents may then be ordered
9 to reimburse EPA for the costs of such activity pursuant to
10 §107(c) of CERCLA, 42 U.S.C. §9607(c).

11 V. Implementation and Completion of Cleanup

12 Respondent shall implement and complete the site cleanup
13 described in the proposal submitted pursuant to paragraph III
14 within 60 days after the proposal is approved by EPA.

15 VI. Final Report

16 Within thirty (30) days of completion of the cleanup,
17 Respondents shall submit to EPA for review and approval, a
18 final report which describes in detail all work undertaken,
19 data, results, evaluations, conclusions, and recommendations.
20 In the event of disapproval of the report, EPA shall inform
21 Respondents of the deficiencies, and Respondents shall make
22 modifications, acquire additional information, and otherwise
23 act to correct the deficiencies within fourteen (14) days,
24 unless time for correction is extended by EPA.

25 VII. Project Coordinator(s)

26 Within fifteen (15) days of the effective date of
27 this Order, each Respondent shall designate, and provide EPA
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1 with the name and address of, a Project Coordinator whose
2 responsibilities will be to receive all notices, comments,
3 approvals and other communications from EPA to the Respondent.
4 Each Respondent shall coordinate its activities pursuant to
5 this Order with all other Respondents to ensure successful
6 completion of all required actions. In the event that Respon-
7 dents choose to designate a single Project Coordinator to
8 represent all or some of the Respondents for this purpose,
9 EPA shall be so notified.

10 VIII. Compliance with Applicable Laws

11 All actions carried out by Respondents pursuant to this
12 Order shall be done in accordance with all applicable Federal,
13 State and local requirements, including requirements to obtain
14 necessary permits and to assure workers' safety.

15 IX. Enforcement

16 Violation of this Order shall be enforceable pursuant to
17 Sections 106(b) and 113(b) of CERCLA, 42 U.S.C. 9606(b) and
18 9613(b).

19 X. Penalties for Noncompliance

20 Failure to comply may also subject Respondents to civil
21 penalties and/or punitive damages in an amount up to three
22 times the amount of any costs incurred by the United States as
23 a result of such failure, as provided in Sections 106(b) and
24 107(c)(3) of CERCLA, 42 U.S.C. 9606(b) and 9607(c)(3). Nothing
25 herein shall preclude EPA from taking such other actions as
26 may be necessary to protect the public health or welfare or
27 the environment and recovering the costs thereof.

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1 **XI. Liability**

2 Nothing herein shall constitute or be construed as a satis-
3 faction or release from liability for any conditions or claims
4 arising as a result of past, current or future operations at the
5 facility. Notwithstanding compliance with the terms of this
6 Order, Respondents may be required to take further actions as are
7 necessary to protect public health or welfare or the environment.

8 **XII. Performance**

9 All response work performed pursuant to this Order shall be
10 under the direction and supervision of a qualified person with
11 expertise and experience in hazardous waste site cleanup.
12 Respondents shall provide EPA with the name(s) of such person(s)
13 and of any contractors and subcontractors to be used in carry-
14 ing out the terms of this Order in advance of their involvement
15 at the site.

16 **XIII. Quality Assurance**

17 Respondents shall use quality assurance, quality control,
18 and chain-of-custody procedures in accordance with EPA Guidance
19 Document QAMS-005/80 throughout all activities. Respondents
20 shall consult with EPA in planning for sampling and analysis.
21 Respondents shall provide quality control reports to EPA and
22 California DOHS certifying that all activities have been per-
23 formed as approved, in accordance with paragraph XII below.

24 **XIV. Site Access**

25 Access to the site shall be provided to EPA and designated
26 State and local government employees, contractors and consultants
27 and all Respondents, at all reasonable times. Such persons shall
28 be subject to the Site Safety Plan. Nothing in this paragraph

1 is intended to limit in any way the right of entry or inspection
2 that EPA may otherwise have by operation of any law.

3 XV. Government Liabilities

4 The United States shall not be liable for any injuries or
5 damages to persons or property resulting from acts or omissions
6 by the Respondents, their employees, agents or contractors in carry-
7 ing out activities pursuant to this Order, nor shall the Federal
8 Government be held as a party to any contract entered into by the
9 Respondents or its agents in carrying out activities pursuant to
10 this Order.

11 XVI. Notice of Intent to Comply

12 Each Respondent shall inform EPA, in writing, within ten (10)
13 days after the date of issuance of this Order, of its intent to
14 comply with the terms of the Order.

15 XVII. Notifications

16 All submittals and notifications to EPA pursuant to this
17 Order shall be made to:

18 Director, Toxics and Waste Management Division (T-1)
19 Environmental Protection Agency, Region 9
20 215 Fremont Street
San Francisco, CA 94105.

21 Copies of all submittals and notifications shall be sent
22 simultaneously to:

23 Angelo Bellomo
24 California Department of Health Services
107 S. Broadway, Room 7128
Los Angeles, California 90012

25 Larry Aker
26 San Diego County Department of Health Services
Hazardous Materials Program
27 1700 Pacific Highway
San Diego, CA 92101

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1 All approvals and decisions of EPA made regarding such submittals
2 and notifications shall be communicated to Respondents by the
3 Director, Toxics and Waste Management Division, U.S. Environmental
4 Protection Agency, Region 9. No informal advice, guidance, sug-
5 gestions or comments by EPA regarding reports, plans, specifica-
6 tions, schedules or any other writing submitted by any Respondent
7 shall be construed to relieve any Respondent of its obligation
8 to obtain such formal approvals as may be required herein.

9 XVIII. Parties Bound

10 This Order shall apply to and be binding upon the Respondents,
11 their officers, directors, agents, employees, contractors,
12 successors, and assigns.

13 XIX. Opportunity to Confer

14 The Respondents may request, within three (3) days after
15 receipt of this Order, a conference with EPA to be held within
16 ten (10) days of the date of issuance to discuss this Order,
17 including its applicability, the factual determinations upon
18 which the Order is based, the appropriateness of any actions
19 which the Respondents are ordered to take, or any other relevant
20 and material issues or contentions which Respondents may have
21 regarding this Order. Respondents may appear in person or by an
22 attorney or other representative at any conference held at its
23 request. Any request for a conference should be made to:

24 Philip T. Brubaker
25 EPA, Region 9
26 215 Fremont Street
27 San Francisco, CA 94105
28 (415) 974-7511

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1 **XX. Effective Date**

2 This Order is effective ten (10) days after the date of
3 issuance, notwithstanding any conferences requested pursuant
4 to paragraph XIX above, and all times for performance
5 or response activities shall be calculated from that date.
6
7

8 Date of Issuance: _____ By: _____

9 Harry Seraydarian
10 Director
11 Toxics & Waste Management
12 Division
13 U. S. Environmental Protection
14 Agency
15 Region 9
16 215 Fremont Street
17 San Francisco, CA 94105
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10 UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9
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12 In the Matter of)
13)

14 CSI CAPACITORS, A DIVISION OF)
15 CSI TECHNOLOGIES, INC., ATI)
INDUSTRIES, AND HAROLD)
DELLETT)

AMENDMENTS TO
ORDER

16 Respondents.)
17)

Docket No. 84-22

18 Proceeding Under Section)
19 106 of the Comprehensive)
Environmental Response,)
20 Compensation and Liability Act)
of 1980 (42 U.S.C. §9606))
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22 Except as amended herein, the Order dated January 11,
23 1985, Docket No. 84-22, remains in full force and effect. The
24 following Sections of the Order are amended as follows:

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1 I. Paragraph III of the Order, at page 7, reads as follows:

2 "III. Cleanup Proposal

3 Submit to EPA within 30 calendar days of the effective
4 date of this Order a written proposal for site cleanup..."

5 Paragraph III is amended to require submittal within
6 by February 27, 1985 (37 calendar days), instead of 30
7 calendar days (February 20, 1985), of the written proposal
8 for site cleanup. As amended, the paragraph shall read as
9 follows:

10 "III. Cleanup Proposal

11 Submit to EPA by February 27, 1985, a written proposal
12 for site cleanup..."

13 II. Paragraph V of the Order, at page 9, shall be amended
14 to read as follows (the amendments are underlined):

15 "V. Implementation and Completion of Cleanup

16 Respondents shall implement and complete the site cleanup
17 described in the proposal submitted pursuant to paragraph III
18 within 60 days after the proposal is approved by EPA. Each Re-
19 spondent shall submit to EPA Region 9, by March 15, 1985, a
20 written Statement of Financial Commitment to complete all
21 aspects of the site clean-up within the time required by
22 this Order. Respondents shall commence substantial cleanup

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1 work at the site within 14 days after receipt of approval
2 by EPA of the site cleanup proposal described in paragraph
3 III of this Order.

4 This Amended Order is effective immediately.

5
6
7 Date of Issuance Feb. 26, 1985

By:

Harry Seraydarian
Harry Seraydarian

Director

Toxics and Waste Management
Division

U.S. Environmental Protection
Agency

Region 9

215 Fremont Street

San Francisco, CA 94105

**Summary of §106 Conference
January 30, 1985**

**Docket No. 84-22
In the Matter of CSI Capacitors, a
Division of CSI Technologies, Inc.,
ATI Industries, and Harold Dellett,
Respondents.**

**Proceeding Under Section 106 of the
Comprehensive Environmental Response,
Compensation and Liability Act of 1980
(CERCLA)**

On January 30, 1985, at 10:30 a.m., a conference pursuant to §106 of CERCLA was held in the offices of Latham and Watkins in San Diego, California. The attendees are listed on the attached attendance list. Representatives of each of the three Respondents attended, as well as representatives from the San Diego County Department of Health Services, the California Attorney General's Office, and EPA.

Bill Wick, Assistant Regional Counsel at EPA, explained that the purpose of the conference was to provide an opportunity for the Respondents to meet with EPA to discuss the Order, and to raise any questions or objections they may have regarding the Order or its terms. Wick explained that a written summary of the meeting would be prepared and that written responses to major objections would be prepared.

Ray Kary of Westec, retained by CSI as a technical consultant, described his assessment of EPA's sampling effort, his coring work, and his general approach to cleanup. EPA's Tom Severino indicated that he was in general agreement with Dr. Kary on the technical issues, but that a significant amount of additional work would have to be completed during cleanup to fully characterize the site. Dr. Kary agreed that such continued characterization work would need to be done, and described his approach as a staged approach.

Dr. Kary said he had roughly calculated costs, but CSI attorney George Shenass said that those costs could not be revealed because they were too preliminary.

Gary Stephany of the San Diego County Department of Health Services urged that a safety and protection plan for workers and employees be included.

1 Dr. Kary said the plan would be forthcoming when required,
2 which Steve McDonald indicated would be about February 20.
3 Tom Severino indicated that EPA would be available to consult
4 on drafts of the cleanup plan.

5 Tom Severino expressed concern that there was not yet a
6 financial commitment from any of the Respondents to actually
7 implement the cleanup plan, and said that such a financial
8 commitment was a necessary element of a meaningful plan.

9 George Shenass, representing CSI, submitted a letter at the
10 meeting describing CSI's position (a copy is attached to this
11 report). Mr. Shenass said that CSI was having problems with
12 its primary lender, the Bank of America, and that CSI's Presi-
13 dent, Bruce Hayworth, died of a heart attack on January 20.
14 Mr. Shenass said CSI was vigorously pursuing insurers.

15 Steve McDonald asked what EPA's responses were to the ob-
16 jections filed by Mr. Dellett to the first Order. Karl Lytz
17 provided an Answer to the January 11, 1985 Order. Bill Wick
18 explained that there had been no response to the prior submis-
19 sion, but that EPA would include Mr. Dellett's Answer (and
20 the Objections, Defenses and Contentions in Response to the
21 \$106 Order) in the record of the \$106 Conference, and
22 respond to the Answer. EPA's response is attached to this
23 report.

24 Doug Caudill, representing ATI, said that ATI expected
25 CSI to resolve the matter. Neither Mr. Dellett nor ATI in-
26 dicated that they would proceed if CSI were unable to do so.

EPA Response to Answer (Objections, Defenses and
Contentions) of Respondent Harold W. Dellett

1. No Joint and Several Liability Under CERCLA §106(a)

Respondent Dellett argues that there is no joint and several liability under CERCLA §106(a).

The Agency believes that CERCLA, including §106(a), does provide for joint and several liability. At least four District Courts that have published opinions on the question of joint and several liability under CERCLA have concluded that federal courts may impose joint and several liability. United States v. Northeastern Pharm. and Chem. Co., ___ F.Supp. ___, No. 80-5066-CV-S-4 (W.D. Mo. Jan. 31, 1984); United States v. A & F Materials Co., 578 F.Supp. 1249 (S.D. Ill. 1984); United States v. Wade, 577 F.Supp. 1326 (E.D. Pa. 1983); United States v. Chem-Dyne Corp., 572 F.Supp. 802 (S.D. Ohio 1983).

Joint and several liability under §106 is an explicit foundation of Agency policy:

"A strong enforcement program is essential to encourage voluntary actions by PRPs (potentially responsible parties). Section 106 actions are particularly valuable mechanisms for compelling cleanups...

"The recognition on the part of responsible parties that they may be jointly and severally liable is a valuable impetus for these parties to reach the agreements that are necessary for successful negotiations. Without such an impetus, negotiations run a risk of delay because of disagreements over the particulars of each responsible party's contribution to the problems at the site." (EPA Interim CERCLA Settlement Policy, December 5, 1984).

That policy is especially compelling in this case. This case is an immediate removal action (requiring a relatively short period of time for cleanup) with only three responsible parties, whereas the Stringfellow case cited by Respondent Dellett is a remedial action (requiring a lengthy cleanup time) with dozens of responsible parties.

2. No Jurisdiction to Compel Actions in a Workplace

Respondent Dellett argues that EPA has no authority to issue the order because the contamination involves a "workplace."

First, the facts do not support Respondent Dellett's contention. The contamination at this site extends beyond the "workplace": it has been detected outside the building,

1 on the grounds and on the loading dock.

2 Second, even if the contamination were confined to the
3 workplace, the §106 Order would be authorized by CERCLA.
4 Respondent Dellett cites only a portion of the relevant
statutory language; the language he omits is critical. Sec-
tion 101(22)(A) excludes from the definition of release:

5 "...any release which results in exposure to
6 persons solely within a workplace, with respect to
7 a claim which such persons may assert against the
8 employer of such persons."

9 What CERCLA actually excludes from the definition of
10 "release" is not the broad category of any "release which
11 results in exposure to persons solely within a workplace."
12 That phrase is further qualified by the phrase Respondent
Dellett omitted: "with respect to a claim which such persons
13 may assert against the employer of such persons."

14 As the legislative history makes clear, the intent of
15 this provision (which, for purposes of this issue, was the
16 language eventually adopted) is:

17 "...to exclude from compensation through the Fund,
18 from liability under section 4, and from the notice
19 provisions of section 3, an injury which is compen-
20 sated through worker's compensation law.

21 "The provision does not broadly exempt releases
22 which occur solely in a workplace from the bill. For
23 example, if a release occurring solely within a work-
24 place created a hazard of damage to human life or to
the environment, it is contemplated that the Fund
would have authority to respond with all of its
authorities except for compensating workers whose em-
ployers are liable for their injuries under worker's
compensation laws." (emphasis added) Senate Rep.
96-848, 96th Cong., 2d Sess., July 13, 1980.

25 3. No Evidence of a Release from a Facility

26 Respondent Dellett argues that there has not been an
27 actual release of PCBs from the building and the property,
28 and that there is no evidence of any threatened release.

29 There is evidence of actual release from the building,
30 which is a "facility" under CERCLA. There is also evidence
31 of a threatened release from the building and the property.
32 One of the Respondents has pumped water from the basement
33 to the parking lot.

34 Moreover, the possibility of a fire presents a threat
35 of a release which could have very serious adverse conse-

1 quences for persons in the area of the building. "There is
2 no requirement that protective measures be limited to actions
3 taken after a crisis has arisen or a catastrophic disaster has
4 struck." Environmental Defense Fund v. Lamphier, 12 E.L.R.
5 20843, 20844 (E.D. Va. 1982).

6 4. No Imminent and Substantial Endangerment

7 Respondent Dellett argues that the contamination at the
8 site does not pose "an imminent and substantial endangerment
9 to the public health, welfare and the environment."

10 However, the PCB contamination and the threat of release
11 do present an imminent and substantial endangerment. "The
12 legislative history of the statute clearly shows that Congress
13 did not intend to require the EPA to conclusively establish
14 the existence of a substantial threat to the environment prior
15 to undertaking a response action." J.V. Peters & Co., Inc.
16 v. Ruckelshaus, 584 F.Supp. 1005, 1011 (N.D. Ohio 1984).

17 In fact, harm is threatened by the continued presence
18 of PCBs at the site. PCBs are toxic compounds, hazardous to
19 human and animal health at extremely low levels. PCBs can
20 enter the body through inhalation, ingestion or dermal con-
21 tact. Direct human contact could result if the contaminated
22 areas are occupied. Significant aerial emissions of toxic
23 by-products of combustion could be emitted from the facility
24 if it ignites, posing a serious health risk for persons in
25 the surrounding community.

26 5. Violation of National Contingency Plan; No Basis for Immedi- 27 ate Removal Action

28 Respondent Dellett argues that immediate removal action in
29 this case is not authorized by the National Contingency Plan
30 because it is not an "acute situation."

31 EPA's action is consistent with the National Contingency
32 Plan. PCBs are toxic compounds which are hazardous to human
33 and animal health in extremely low concentrations. PCB con-
34 tamination has been documented at the facility. Although EPA
35 actions requiring restriction of access and elimination of
36 rainwater have minimized some of the hazard, the possibility
37 of a fire in the building -- an old, wooden structure -- pre-
38 sents precisely the "acute situation" described in the NCP.
39 Immediate removal of the PCBs will prevent the immediate risk
40 of harm to human health and to the environment from the con-
41 tinued presence of the toxic PCB compounds.

1 6. Violation of NCP; No Basis for Planned Removal

2 Respondent Dellett argues that there is no basis for a
3 "planned removal" under the NCP. As Respondent Dellett him-
4 self notes, EPA has not proceeded with a planned removal.
5 Thus, this argument is not relevant to this Order.

6 7. Laches

7 Respondent Dellett argues that the doctrine of laches pre-
8 vents EPA from issuing this Order, citing earlier inspections.

9 There is no doctrine of laches which prevents the issuance
10 of this Order in this case. The fact that EPA may have pre-
11 viously conducted inspections, pursuant to a different statute,
12 does not bar the issuance of an Order under §106 of CERCLA.

13 8. Acts or Omissions of Third Parties

14 Respondent Dellett argues that it is not liable under
15 CERCLA because the actual or threatened release was caused
16 solely by the acts or omissions of third parties who were not
17 employees or agents of Respondent, which acts or omissions
18 did not occur in connection with a contractual relationship
19 existing directly or indirectly with Respondent.

20 Respondent is incorrect. Respondent Dellett had a con-
21 tractual relationship with ATI, with ATI leasing Dellett's
22 premises. ATI had a contractual relationship with CSI,
23 with CSI subleasing Dellett's premises. The "third party"
24 defense under §107(b)(3) of CERCLA is available only if
25 the third party is "other than an employee or agent of
26 the defendant, or than one whose act or omission occurs in
27 connection with a contractual relationship, existing directly
28 or indirectly, with defendant..." Clearly, when a building
is contaminated by a leasee or subleasee of the owner, the
contamination occurs "in connection with a direct or indirect
contractual relationship."

29 9. Inequitability of Order

30 Respondent Dellett argues that since he is the owner of
31 the site, but had no involvement in the contamination of
32 the site, it is "inequitable" to include him as a Respondent
33 of a §106 Order.

34 Not only is it not inequitable, it is precisely what
35 Congress intended. Owners of facilities are liable under
36 §107(a)(1) of CERCLA.

10. Order Not in the Public Interest

Respondent Dellett asserts, without elaboration, that the Order is "not in the public interest."

EPA believes that the Order is in the public interest, and that it fully complies with the letter and the spirit of CERCLA.

11. Order Is Not Necessary to Protect Public Health

Respondent Dellett argues that the Order is "not necessary to protect public health."

The Order is necessary to protect public health. A hazard exists in the form of PCB contamination at the facility. The building remains unsafe, and a threat to persons and the environment, as long as the PCB contamination remains. The Order requiring cleanup is designed to protect public health.

12. Order Is Overbroad and Violative of Respondent's Right to Due Process of Law

Respondent Dellett argues that the Order is "overbroad" and violative of "due process."

The Order is not overbroad. It requires only that Respondents remove the toxic PCBs to a level which will protect the public health.

Respondent Dellett has not been denied any "due process" rights. In fact, the §106 conference and this report are part of EPA's effort to ensure that Respondent Dellett and the other Respondents are heard and fairly treated.

There exists "little risk of plaintiff's interests being erroneously deprived under the terms of CERCLA. Furthermore, since CERCLA was enacted to permit the EPA to swiftly respond to environmental emergencies, any additional or substitute procedural safeguards would thwart the purpose of the statute." J.V. Peters & Co., Inc. v. Ruckelshaus, 584 F.Supp. 1005, 1011 (N.D. Ohio 1984).

13. No CERCLA §106(b) or §107(c)(3) Penalties

Respondent Dellett argues that the imposition of penalties or punitive damages would violate Respondent's right to due process, and that no such penalties can be imposed.

EPA has not violated any Respondent's rights to due pro-

cess. There is no impediment to the imposition of penalties or damages which Congress provided in CERCLA.


14. No Causation

Respondent Dellett argues that he did not "cause or contribute to an actual or threatened release," and therefore concludes that he may not be the subject of a \$106 Order.

EPA is authorized to issue a \$106 Order "to protect public health and welfare and the environment." There is no limitation specified in the Act which narrows the universe of recipients of such an Order. However, it is clear that Congress contemplated that at least those persons liable under \$107 of CERCLA may be recipients of \$106 Orders. Respondent Dellett is liable under \$107 of CERCLA, which provides that the owner of a facility is liable under the Act.

Dated: February 20, 1985

By:


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